(3)

No. 86-893

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JACKSON WATER WORKS, INC., and
CITIZENS UTILITIES COMPANY
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
and THE CITY OF JACKSON, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a state statutory scheme which accords a municipality the privilege of seeking valuation of property for purposes of condemnation in either of two forums—the State Superior Court or the California Public Utilities Commission—results in a classification which is rationally based and reasonably related to a public purpose affording Petitioners equal protection under the law.

(2) Whether such a statutory scheme affords Petitioners due process of law.

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THE PUBLIC UTILITIES COMMISSION
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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This proceeding arises because the Respondent City of Jackson, a California municipal corporation, filed a petition pursuant to California Public Utilities Code (P.U. Code), Section 1401, *et seq.*, requesting that Respondent Public Utilities Commission of the State of California fix the just compensation which should be paid by the Respondent City of Jackson for the public utility lands, property, and rights of Petitioner Jackson Water Works, Inc.

The California Public Utilities Commission is a constitutional agency of the State of California having been created by Article 12, Section 1, of the California Constitution. Section 5 of that Article is as follows:

> Sec. 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with

> this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

The provisions of Section 5 were added as an amendment to the State Constitution in 1914. In *Marin Water and Power Company v. Railroad Commission of the State of California*, 171 Cal. 706 (1916) the State Supreme Court concluded that the Commission's authority to fix just compensation for utility property taken by eminent domain as derived from Section 5 is a judicial power.

Pursuant to Section 5 the State Legislature enacted Sections 1401-1421 of the P.U. Code dealing with the subject of the determination of just compensation for acquisition of utility properties. Section 1405 requires the Commission, upon the filing of a petition, to make its order to show cause as to why the Commission should not proceed to hear the petition. Pursuant to a petition filed by the City of Jackson, the Commission issued an order to show cause.

Petitioners Jackson Water Works Inc. and Citizens Utilities Company filed an action on June 4, 1984 in the United States District Court for the Northern District of California seeking declaratory and injunctive relief. Thereafter the Petitioners appeared in the Commission proceeding before an Administrative Law Judge on June 22, 1985 pursuant to the order to show cause, but did not show cause why the Commission should not proceed. In the action before the District Court, after cross-motions for summary judgment, the court issued a written order granting Respondents' motion for summary judgment and entering a judgment for Respondents on February 6, 1985.

Petitioners filed a motion with the District Court for an injunction preventing Respondents from proceeding with the just compensation proceedings. The District Court issued the injunction on February 25, 1985.

Petitioners' appealed the judgment and order to the United States Court of Appeals for the Ninth Circuit which affirmed with one dissent the judgment and order of the District Court.

The Ninth Circuit stayed the issuance of its mandate extending the District Court's injunction pending this Court's disposition of the case.

REASONS FOR DENYING THE WRIT

The petition fails to demonstrate a compelling reason for this Court to grant certiorari. The Petitioners do not demonstrate that conflicts between circuit courts exist. At best they show that on differing facts involving differing interests courts reached differing results. They do not demonstrate that an unsettled question of federal law is present. The issues of equal protection of the laws and due process have been the subject of scores of federal cases including a number of cases before this Court and the issues presented have long been settled by this Court. What Petitioners ask is that the two tier equal protection analysis sanctioned by this Court be re-examined and a new rule issued. Petitioners have not demonstrated that the case presents issues of national importance so that review by this Court is warranted. The Ninth Circuit's resolution of this case accords with precedent and should be allowed to stand.

I

PETITIONERS' BASIC RIGHT TO JUST COMPENSATION IS PROTECTED

At the threshold it should be noted that the central and basic interest that Petitioners have in a proceeding for valuation of property to be taken in condemnation is the financial one of the amount of compensation to be paid them for the taking of property. This is the ultimate right entitled to constitutional protection. The Petitioners have utterly failed to demonstrate either before the District Court (A32-33) or the Ninth Circuit (A-8) that this right has been affected.[1] They merely complain of the process they are compelled to undergo before the Public Utilities Commission in order to receive just compensation. If the

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[1]All references herein are to the appendix filed by the Petitioners. Respondents are filing a supplemental petition setting forth statutes and state constitutional provisions that are cited for the first time in Respondents brief.

right to just compensation is fully protected and not impinged upon how can the process that leads to it be deemed unconstitutional? Petitioners do not complain of substance but of procedure that leads to no ascertainable constitutional injury.

II

THE DECISION BELOW CORRECTLY APPLIES ESTABLISHED DOCTRINES OF EQUAL PROTECTION, DUE PROCESS AND APPELLATE REVIEW.

A. The Ninth Circuit's Equal Protection Analysis Is In Accord With Precedent

Petitioners search in vain to identify an interest or a right that can be characterized as "fundamental." Thus they speak of access to a court (Petition, p. 7), the right to a jury (Petition, p. 8), the right to appeal (Petition, p. 9) and "significant interests" (Petition, p. 10). What Petitioners actually are seeking is a revision of the existing two-tier equal protection analysis so that the economic right they assert will rise to a level whereby it is entitled to heightened or strict scrutiny under an equal protection analysis.

The court below applied a standard of rational basis in establishing a level of review in its equal protection analysis, having concluded that Petitioners economic interest was not a fundamental one. (A. 7-8) And, as has been noted, the right to just compensation was not impaired. In addressing the issue of the rationality of the statute the court below applied the plausible arguable, or conceivable standard. On all counts the court is correct.

The cases cited on this point by Petitioners in their petition are cases wherein the facts demonstrate that other than economic rights were affected so that the Court found that there had occurred a constitutional injury and cases where the majority of the Court held that on the facts no constitutional injury had occurred at all. *Logan v. Zimmerman*, 455 U.S. 422 (1982) (lost cause of action is a lost property right); *United Mineworkers v. Illinois Bar Assn.*, 389 U.S. 217 (1967) (right to assembly and free speech impaired); *U.S. Retirement Board v. Fritz*, 449 U.S.

166 (1980) (no denial of equal protection); *Richardson v. Belcher*, 404 U.S. 78 (1971) (no denial of equal protection); *Humphrey v. Cady*, 405 U.S. 504 (1972) (restriction of personal liberty by commitment to an institution without a jury trial); *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal alien children's right to education); *Cleburne v. Cleburne Living Center*, ____ U.S. ____ 87 L.Ed2d 313, (1985) (special use permit requirement for mentally retarded, but not for other groups, discriminates); *Weber v. Aetna Casualty & Security Co.*, 406 U.S. 164 (1972) (discrimination against children on the basis of illegitimacy); *Vlandis v. Kline*, 412 U.S. 441 (1973) (irrebuttable presumption of nonresidence is discriminatory); *Williams v. Vermont*, 472 U.S. 14 (1985) (state tax discrimination); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (sex based discrimination against woman regarding social security benefits); *Schweiker v. Wilson*, 450 U.S. 221 (1981) (no denial of equal protection); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (administrative procedure terminating benefits is fair); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (civil servant's interest in employment is a property right so that some form of pretermination hearing is required).

B. Petitioners Have Not Been Denied Due Process of Law. Petitioners Do Not Have A State Right To A Jury Trial

Petitioners are not guaranteed any particular form of state procedure under the due process clause because what is required is reasonable notice and an opportunity to be heard.[2] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Dohany v. Rodgers*, 281 U.S. 362 (1930). The equal protection clause does not demand uniformity of state procedure as, for example, restriction of eminent domain suits to state trial courts. The Ninth Circuit decision is eminently correct in the regard.

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[2] Petitioners do not deny that they received notice of the Commission's Order to Show Cause or that they will be afforded a fair hearing. Indeed they have appeared before the Commission in a prehearing conference on June 22, 1984.

As the Court stated in *Dohany v. Rodgers*, 281 U.S. 362 at page 369:

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. Reetz v. Michigan, 188 U.S. 505, 508 47 L. ed. 563, 566, 23 Sup. Ct. Rep. 390; Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 70 L. ed. 818, 46 Sup. Ct. Rep. 384; Bauman v. Ross, 167 U.S. 548, 593, 42 L. ed. 270, 289, 17 Sup. Ct. Rep. 966; A. Backus Jr., & Sons v. Fort Street Union Depot Co., 169 U.S. 569, 42 L. ed. 859, 18 Sup. Ct. Rep. 445. 74 L. ed. 912.
>
> "Nor does the equal protection clause exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another. That condemnation proceedings under the Highway Act are conducted on behalf of the state is in itself sufficient basis for the exercise of the legislative judgement in providing for it a different procedure from that prescribed for the exercise of eminent domain by a private corporation. See A. Backus Jr. & Sons v. Fort Street Union Depot Co. supra (169 U.S. 570, 42 L. ed. 859, 18 Sup. Ct. Rep. 445)."

The Petitioners complain that the California statutory scheme provides identically situated litigants substantially different rights (Petition, p. 3). The scheme may provide a different procedure but it does not affect basic rights. All who are subjected to the procedure are treated equally. Appellants' basic right—the right to just compensation—is not affected. And, while the procedures in a State Superior Court and before the Commission are different the law is applied equally.

The Ninth Circuit concluded that the law of valuation is the same before a Superior Court and before the California Public Utilities Commission and is codified in Section 1263.320 of the

California Code of Civil Procedure. (A14). As the Commission explained in *East Yolo Community Services District,* 1 CPUC 2d 474 (1979), at pages 476-477:

> "The just compensation for the taking of the land, property, and rights of the condemnee is measured by the market value of such land, property, and rights. In *Sacramento etc. R.R. Co. v. Heilbron* (1909) 156 Cal. 408, 409, market value was defined as:
>
> > '. . . the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable.'
>
> "The Commission has applied a similar definition, which appears to be derived from the *Heilbron* rule. In *City of Riverside* (1972) 74 CPUC 193, 202 the Commission stated:
>
> > 'We have used, as the measure of value of the properties herein, the concept of the highest price, estimated in terms of money, that a willing buyer would pay to a willing seller for the property if exposed for sale on the open market, where each is under no unusual pressures of time or circumstance and each has knowledge of all the uses and purposes for which it is reasonably capable of being used.'
>
> "The Heilbron Rule has in turn been codified in section 1263.320 of the Code of Civil Procedure as follows:
>
> > (a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

> '(b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable.'
>
> "The Commission concludes that the *Heilbron* rule, as variously expressed, constitutes the standard which the Commission should apply when valuing public utility property for just compensation purposes."

In all respects Petitioners have been afforded due process of law.

C. Petitioners Have A State Right To Judicial Review Adequate To Insure Protection of Rights Under The Federal Constitution

One prong of Petitioners' assault on the state procedures in issue is that the procedures deny them the right to judicial review because the prescribed manner of appeal from a Commission decision is by petition for writ of review to the State Supreme Court and that the California Supreme Court rarely grants such review. However, under state law a denial of a petition for review by the State Supreme Court is a decision that fulfills the functions of a review.

The means to petition for judicial review is provided by Section 1756, P.U. Code, "which serves in effect the office of an appeal." *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891, 901 (1979). The State Supreme Court in *Consumers* explained that even summary denial of a petition for writ of review without opinion is a decision on the merits for res judicata purposes. See also *Pacific Telephone and Telegraph Co. v. The Public Utilities Commission*, 600 F.2d 1309 (9th Cir. 1979). Thereafter, Petitioners have the right to petition from a final judgment of the California Supreme Court for a review of any federal questions in the United States Supreme Court with no loss of other federal rights. 28 U.S.C. 1257. *Consumers*, by the way, is one of many examples where the court has granted a petition for a writ.

The state judicial review proceedings available to Petitioners are adequate to vindicate federal or other claims. Petitioners have a speedy and effective remedy available for such claims because any challenge to an order of the Commission will go directly to the Supreme Court of the State of California, bypassing the intermediate California appellate court system. (Section 1759 P.U. Code.) Furthermore, Petitioners have a specific right to challenge the validity of a Commission order or decision on the ground that it violates rights under the Constitution of the United States, rights Petitioners assert will hereby be violated. (Section 1760 P.U. Code.) Moreover, when a Commission order is challenged on the ground that it violates rights under the U.S. Constitution the Supreme Court of California "shall" exercise an independent judgment on the law and facts. (Section 1760 P.U. Code.) Finally, such actions before the State Supreme Court shall be preferred over all other civil cases except election causes (Section 1767 P.U. Code).

Contrary to Petitioners' allegations, there is therefore no judicial deference (Petition, pp. 15-17) to the power to take and the procedures for fixing just compensation do not place the power to take beyond judicial constraint.

D. Because Petitioners Have Been Afforded Due Process and the Right of Appeal There Is No Judicial Deference to the Concept of Conceivable Justifications for Legislation Affecting Judicial Remedies

Petitioners advance the assertion that courts are deferring to the conceivable justification standard arguing that procedu ral rights are judicial guarantees and that procedures should be free of arbitrary distinctions. (Petition, pp. 17-19). The statutory scheme under attack in this case is free of arbitrary distinctions and the courts below so found.

Petitioners imply that the decision below is counter to this Court's precedent in *Lindsey v. Normet*, 405 U.S. 56 (1792) and *Humphrey v. Cady*, 405 U.S. 504 (1972). In *Lindsey* an Oregon statute provided that if a tenant intended to appeal an adverse decision in a rent dispute the tenant must post two sureties, while all others were required to post single bond. In *Lindsey*, the

discrimination against the poor is obvious. Here all who are subjected to the procedure before the California Public Utilities Commission share an equal right to appeal. *Humphrey*, on the other hand, concerned a procedure whereby a person's confinement to a sex deviate facility could be extended for five years without a jury trial. The important right of personal freedom was at issue. That sort of right is not at issue here.

III

THERE DOES NOT EXIST A CONFLICT IN CIRCUITS

Petitioners argue that certain suggestions by this Court have resulted in conflicting decisions by lower courts, thereby implying the existence of a conflict between decisions in different circuits. (Petition, p. 13). The cases cited in support of this argument display nothing more than the traditional equal protection analysis of the standard of scrutiny, the nature of the right (fundamental or not), and if rational relationship to a state or governmental purpose exists.

Thus in *Diebler v. City of Rehoboth Beach*, 790 F.2d 328 (3rd Cir. 1986) a city charter provision required that candidates for a city office not be delinquent in tax payments. The court held that the restriction did not impinge upon a fundamental right but that the interest of the City in screening candidates bears no rational relationship to a governmental purpose because an individual decision not to pay taxes does not logically reflect the candidate's commitment to the city but may rest solely on economic, ideological or other personal grounds. There a candidate was deemed delinquent owing to a protest against a tax. In *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) a state statute limited non-economic losses in medical malpractice to $250,000. The court held that malpractice victims were not a suspect class, tort damage is not a fundamental right and that the legislature had a plausible reason for the legislation. In *Frazier v. Heebe*, 788 F.2d 1049 (5th Cir. 1986) a rules requirement that members of the bar of a Federal District Court in Louisiana have an office within the confines of the District were upheld because the *pro hac vice* provisions of the rules permitted non-members to practice and

because the regulatory scheme bore a rational relationship to the court's goal of efficient administration of justice.

All three cases merely applied the traditional two tiered analysis.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated, San Francisco, California, December 30, 1986.

Respectfully submitted,

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UNITED STATES CODE
28 U.S.C.A. § 1257

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

CALIFORNIA CONSTITUTION
ARTICLE 12 SECTION 1

Art. 12, § 1 CONSTITUTION

§ 1. Commission; membership vacancies; removal

Section 1. The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two-thirds of the membership of each house concurring.

CALIFORNIA CONSTITUTION
ARTICLE 12 SECTION 5

§ 5. Additional authority and jurisdiction of commission; review; eminent domain

Sec. 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

CALIFORNIA PUBLIC UTILITY CODE

§ 1760. Constitutional questions

In any proceeding where the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

§ 1767. Preference of actions and proceedings

All actions and proceedings under this part and all actions or proceedings to which the commission or the people of the State of California are parties in which any question arises under this part, or under or concerning any order or decision of the commission, shall be preferred over, and shall be heard and determined in preference to, all other civil business except election causes, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the commission in any action or preceeding in which he is allowed to intervene.

CITED AS 1 CPUC 2d 474

DECISION No. 90360, APPLICATION No. 57906
(June 5, 1979)

OPINION

By the filing of its petition on March 2, 1978, East Yolo Community Services District (East Yolo) invoked the Commission's jurisdiction under Public Utilities Code[1] Section 1401 *et seq.* to determine the just compensation for the acquisition by East Yolo of the public utility properties of the Washington Water and Light Company (Washington).

On March 21, 1978, the Commission issued Decision No. 88619 directing Washington to show cause why the Commission should not proceed to hear the petition of East Yolo and to fix the just compensation to be paid for the lands, properties, and rights of Washington. Pursuant to Decision No. 88619, prehearing conferences were held on April 14 and August 22, 1978, and public hearings were held before Administrative Law Judge Robert T. Baer on October 31 and on November 1, 2, 3, 27, and 28, 1978, in San Francisco.

Concurrent opening briefs were filed on January 26, 1979, and concurrent closing briefs were filed March 13, 1979. The matter is now ready for decision.

Description of Washington's Service Area and Facilities

Washington's service area is entirely within unincorporated areas of Yolo County. It generally encompasses areas known as Bryte, Broderick, and West Sacramento. On the north and east the service area boundary is the Sacramento River, the midline of which is the border of Sacramento and Yolo Counties. The service area is bisected by the Interstate 80 freeway and includes the Interstate 80 and 880 freeway interchange. The most heavily developed part of the service area is directly across the Sacramento River from Old Sacramento. The Southern Pacific and the

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[1] All references hereafter to code sections are to the Public Utilities Code, unless otherwise indicated.

Sacramento Northern railroads and the Sacramento River Deep Water Canal cross the service area.

Water is furnished to the 6,067[2] customers from 22 wells and through approximately 455,000 feet of distribution main. Five steel tanks provide storage of approximately 1.6 million gallons. Two major treatment plants, with total capacity of 7.1 million gallons per day, treat all the water produced by six of the wells.

Issues

The central issues in this proceeding are:

(1) What standard should the Commission apply in valuing Washington's facilities?

(2) Is the Commission bound to consider only the reproduction cost new less depreciation (RCNLD) method of valuation in arriving at its findings of just compensation, as Washington argues; or may the Commission consider that method together with the market data and capitalization of earnings approaches, as East Yolo argues?

(3) Was East Yolo's market data and capitalized earnings evidence properly admitted?

(4) What weight should the Commission give to Washington's evidence of value using the RCNLD method, yielding an estimate of value of $13,007,450,[3] and to East Yolo's evidence using market data and capitalized earnings, yielding estimates of value ranging from $2 million to $2.6 million?

Discussion

The just compensation for the taking of the land, property, and rights of the condemnee is measured by the market value of such

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[2] As of March 2, 1978, service was provided to 5,224 flat-rate and 843 metered customers. The great majority of flat-rate customers are residential customers, while the metered customers are generally industrial and commercial customers.

[3] This figure includes $11,924,800 for facilities, $350,650 for land, and $732,000 for the taking of Washington's service area. (Exhibit 8.)

land, property, and rights. In *Sacramento etc. R.R. Co. v. Heilbron* (1909) 156 Cal 408, 409, market value was defined as:

> "... the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable."

The Commission has applied a similar definition, which appears to be derived from the *Heilbron* rule. In *City of Riverside* (1972) 74 CPUC 193, 202 the Commission stated:

> "We have used, as the measure of value of the properties herein, the concept of the highest price, estimated in terms of money, that a willing buyer would pay to a willing seller for the property if exposed for sale on the open market, where each is under no unusual pressures of time or circumstance and each has knowledge of all the uses and purposes to which the property is best adapted and for which it is reasonably capable of being used."

The *Heilbron* rule has in turn been codified in Section 1263.320 of the Code of Civil Procedure, as follows:

> "(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.
>
> "(b) The fair market value of property taken for which there is no relevant market is its value on the date of valuation as determined by any method of valuation that is just and equitable."

The Commission concludes that the *Heilbron* rule, as variously expressed, constitutes the standard which the Commission should apply when valuing public utility property for just compensation purposes.

The RCNLD Method of Valuation

Washington contends that in valuing public utility property the Commission must apply the RCNLD method to arrive at fair market value. It cites in support of that proposition *City of Riverside*, supra, and certain other Commission decisions.[4a] Although the Commission in the *City of Riverside* case used the RCNLD method in arriving at its finding of just compensation, it did not hold that the RCNLD method was the only method of valuation that could be used to value public utility property. In fact, at 74 CPUC 202 the Commission stated:

> "We also recognize that there is no precise formula for determination of just compensation. The Commission, in previous just compensation cases, has considered a number of value criteria, with varying emphasis, in the performance of its duty to reach an independent judgment on just compensation based on resolution of conflicting testimony and other conflicting data in records before it. Among the criteria that have been considered are: (a) original cost rate base, depreciated; (b) comparable sales; (c) capitalization of earnings and (d) present day cost; i.e., (1) reproduction cost new less accrued depreciation of physical properties; (2) market value of lands, easements and rights-of-way, (3) market value of water rights, and (4) organization costs and going concern value. The Commission has also considered record facts having an adverse effect on market value."

The other Commission decisions cited by Washington do not purport to bind the Commission to follow the RCNLD method nor do they invariably apply that method. For instance, in *City of Redding* (1934) 39 CPUC 193, 195 the Commission stated that ". . . the reproduction cost to be arrived at is not itself value but only one of several criteria of value." And in *SMUD* (1942) 44 CPUC 467 the Commission found that the RCNLD for a portion of PG&E's electric distribution system in the Sacramento area was $8,318,000, but nevertheless held that the just compensation was $10,600,000. PG&E's and SMUD's estimates of market

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[4a] See Washington's opening brief, pp. 4-5.

value, based principally on earning power, were $12,500,000 and $9,400,000, respectively.

Washington cited *PG&E v Devlin* (1922) 188 C 33 for the proposition that the Commission must determine just compensation by the RCNLD method. However, *Devlin* does not so hold. In *Devlin* the only evidence of value offered was based on the RCNLD method. Thus, no issue was raised as to the appropriateness of that method or of any other method of valuing public utility properties for just compensation purposes.

Other Commission, state, and federal decisions were cited by Washington to support its contention that the Commission must apply the RCNLD method, but none of them support that position.[4b]

As additional support for the Commission use of the RCNLD method, Washington argues that only such method provides compensation for all elements of utility property. This point refers to property acquired by the utility by contribution or by advances in aid of construction. The argument is made that because such property is not included in utility plant for ratemaking purposes, the earnings of the utility do not reflect its existence and thus it is ignored by capitalized earnings studies. We believe, however, that this is largely a specious issue. It is tantamount to arguing that, because capitalized earnings method is not the RCNLD method, it may not be employed. The question is not whether the capitalized earnings methodology involves an accounting of each item of utility property as does the RCNLD method. Rather the question is whether capitalized earning is a valid means of estimating just compensation, or fair market value, which is used by reasonable buyers and sellers of properties to arrive at negotiated sales prices and which is recognized by the court and the legislature as an appropriate valuation tool. This question will be addressed with more particularity, *infra*.

[4b] In *U.S. v 564.54 Acres of Land, No. 78-488*, decided May 14, 1979, the United States Supreme Court held that allowing respondent the fair market value of its property, rather than the cost of substitute facilities, is consistent with the principles of fairness underlying the Just Compensation Clause of the Fifth Amendment.

East Yolo squarely addressed the issue of contributions and advances in its closing brief. It first stipulated that it would assume the liability of Washington's unrefunded advances, thus making it unnecessary to compensate Washington for the property represented by those advances. Of course, the property represented by refunded advances is presumably in rate base and is thus reflected in capitalized earnings studies.

With regard to contributed property East Yolo argues:

> "... these contributions are in fact water utility facilities that were constructed and paid for by the water users. The water users were then required to donate those facilities to Washington ... Why should the water users now be required to pay Washington ... for those same facilities? We submit [that] the proper valuation for contributions is to recognize that they are in fact donated to the utility company subject to a trust or a third party beneficiary contractual obligation that they be used for utility purposes. Putting it another way the only interest that the utility company has in the contributed facilities is a possessory interest which must be assumed by the acquiring public agency. Certainly the law of just compensation does not contemplate or require that the water users build and pay for say a $200,000 treatment plant, then be required to donate it to the private utility and then when the water users elect to condemn the private utility pay the private utility another $200,000 for that treatment plant which the water users paid for and were required to donate in the first instance.
>
> "Frankly, we know of no case which has considered the point but we submit that the proper approach to contributed property is that it is in essence held by the private utility as a trustee for the benefit of the water users, and that the interest of the private utility in that contributed facility is a nominal interest and that in essence the public agency that acquires that contributed facility acquires it subject to the trust or third party beneficiary contractual responsibility.
>
> "We submit that the valuation of contributions or contributed facilities should be treated differently than other utility

> property. The facilities represented by contributions were required to be donated by the water users. A valuation approach which recognizes this fact is in essence a '... method of valuation that is just and equitable' (Code of Civil Procedure, Section 1263.320(b). It is certainly not 'just and equitable' to require the water users to buy back from the utility company the same property that they were previously required to donate to that utility company." (East Yolo's closing brief pp. 22-24.)

The foregoing quotation expresses the correct view on the issue of valuation of contributed facilities. The Commission concludes that it is not bound to employ only the RCNLD method, either on the basis of the authorities cited by Washington or on the basis of the argument that only such method compensates Washington for all valuable elements of utility property.

Admissibility of Capitalized Earnings and Market Data Evidence

Washington contends that evidence of capitalized business income is inadmissible under California law, citing Evidence Code Section 819.[5] However, East Yolo cites the case of *South Bay Irr. Dist. v. California-American Water Co.* (1976) 61 CA 3d 944, which holds that such evidence is admissible, relying upon Section 814 of the Evidence Code.[6] (See 61 CA 3d at 980.) The Court in *South Bay* reasoned that since capitalization of the

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[5] "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and the existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon)."

[6] "The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for his opinion."

income of a condemned public utility is not a matter included in Evidence Code Section 819, it may be a basis for an opinion or determination of the market value of the condemned public utility.

We conclude that the *South Bay* case states the correct rule on the admissibility of evidence of capitalized earnings of a public utility in a just compensation case.[7]

Washington's arguments concerning market data evidence are basically directed to the weight of that evidence, and not its admissibility. The following discussion of the evidence will address those arguments.

Discussion of the Evidence

The following table summarizes the evidence of value offered in this proceeding:

Witness	*Valuation Method*	*Result 000*	*Opinion Of Value 000*
Rhodes, for East Yolo	Capitalization of Earnings	$1,636-2,235	
	Sales Comparison	2,635	
	Cost Approach	1,641-2,242	
			$2,000
*Powell, for East Yolo.....	Capitalization of Earnings	2,800	
	Market Approach	2,840	
	RCNLD	8,200-9,400	
			2,600
Clendenen, for East Yolo ...	RCNLD	9,570	
			None
Stone, for Washington	RCNLD	11,924.8	
			11,924.8

*Ex. 3, pp. 12-13 indicates ratebase of $2,840,000 as of March 2, 1978.

East Yolo stated in its opening brief, p. 2:

> "In our view it is of little moment whether the reproduction cost new estimate is $9,570,000 as testified to by Mr. Clendenen (Vol. 1, RT pp. 117-1120) or $11,924,800 as

[7] The Commission does not concede that the Evidence Code or the Code of Civil Procedure and District Court of Appeal decisions interpreting those codes necessarily govern the admissibility of evidence in its proceedings. (See Section 1701 of the Public Utilities Code.) However, such statutory and case law will be considered persuasive authority.

> testified to by Mr. Stone (Exhibit 5, p. 12) or some other sum, and we don't feel that it would serve any useful purpose to discuss in detail the specifics of the respective reproduction cost new less depreciation estimates."

Accordingly, the Commission will accept Washington's figure of $11,924,800 as the RCNLD of Washington's facilities (exclusive of the land value and other items of damages claimed).

Mr. Stone, Washington's valuation witness, was of the opinion that RCNLD equalled just compensation. He considered no other valuation method in making his study. Thus, his opinion of value must stand or fall on the validity of the proposition that RCNLD equals just compensation, i.e., that no other valuation methodology is appropriate in this case.

The evidence in this proceeding supports a finding that there is a relevant market for water companies in California. Admittedly, sales of water companies do not occur as frequently as sales of raw acreage or three bedroom houses. however, such transactions do occur with sufficient regularity for us to conclude that evidence of those sales would shed light upon the value of the subject property. However, regardless of whether there is a relevant market for property "[T]he Evidence Code provides that . . . its fair market value may be determined by reference to matters of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property including where appropriate, but not limited to, (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or reproduction less depreciation) formula." (Legislative Committee Comment to Code of Civil Procedure Section 1263.320.)

We are convinced that an expert in forming an opinion as to the value of the subject property could not reasonably consider solely the RCNLD method of valuation.

We are impressed by East Yolo's argument with respect to the total price tag Washington has placed on its operation.

> "Looking at the bottom line Washington Water & Light Company and Citizens Utilities Company contend that they

are entitled to 'just compensation' of $14,773,408,[8] for the taking of utility property that has produced over the last twelve years average annual net income of only *$43,670* (see Exhibit 2-C)."

* * *

"... No knowledgeable prospective purchaser of utility property would just ignore income and market data and in essence buy a water utility for a price that is *338* times the average annual net income that has been obtained from the utility property...

"Bluntly stated any knowledgeable purchaser would look at the Washington Water & Light Company and Citizens Utilities Company's price tag of $14,773,408 and conclude that he could invest that sum in high grade bonds or certificates of deposit and realize an annual income of about $1,477,340 (10%) and that it would be silly to spend $14,773,408 to acquire a water utility that had been able to generate only $43,670 of [average] annual net income. In other words a knowledgeable purchaser would realize that a conservative investment of the $14,773,408 in high grade bonds or certificates of deposit would result in an annual income that was *thirty* (30) times higher than the annual net income that the water utility property had been able to produce.

"Taking that into account, and considering that this water utility will require major expenditures of about $10,500,000 to correct water pressure and water quality deficiencies (Exhibit 1, p. 37; Vol. 1, RT pp. 87-88, 113-116) and additional sums to replace 'Material Parts of Washington's system' which are approaching 'the probable end of their service lives' (Vol. 4, RT pp. 417-419), no one in his right mind would even consider paying the $14,773,408 price that

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[8] The sum of $14,773,408 includes $11,924,800 for facilities, $350,650 for real property, $575,335 for severance and related damages, $1,190,623 for loss of the Port Sacramento Industrial Park (PSIP) System, and $732,000 for loss of the undeveloped service area. (Exhibit 8.)

Washington Water & Light Company and Citizens Utilities Company contend that they are entitled to receive for this water utility property." (Opening Brief, pp. 106-107)[9]

That Mr. Stone did not apply the *Heilbron* standard (as codified in Code of Civil Procedure Section 1263.320(a), *supra*) is clear from his own testimony. Mr. Stone was asked:

"Q And I take it, then, you didn't appraise this property, then, to determine the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with a reasonable time allowed in which to find a purchaser, buying with full knowledge of the uses and purposes for which it was adopted and for which it was capable?

'A It might represent that. But I didn't use that as any theorem of my appraisal." (Vol. 3, RT pp. 395-396.)

We have determined that it is reasonable in this instance to apply the *Heilbron* standard (as codified, *supra*) in valuing Washington's property. It has also been determined that willing buyers and sellers of such property would not look merely to an appraisal using the RCNLD method to arrive at the price. Mr. Stone did not apply the *Heilbron* standard. He did not consider any other valuation methodology in making his appraisal. He conceded that the income of property was a "very important element in the purchase of property", but that he gave absolutely no weight or consideration to that factor.[10] Washington is asking the Commission to place a value on its property without consider-

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[9] Mr. Powell, one of East Yolo's appraisers, testified to the same effect. (Exhibit 3, pp. 17-18.)

[10] 'Q. . . . Would any knowledgeable buyer of any income-producing property, including public utilities, ever even attempt to arrive at the value of what he's going to pay for that property if he didn't know what the income might be?

"A. That's a very important, very important element in the purchase of property. No question about it.

"Q. And that's something that you gave absolutely no weight or consideration to?

ing that very important factor of income. However, the Commission cannot fail to consider income and still apply the *Heilbron* standard. Thus, the RCNLD method cannot be considered to define or govern our finding of just compensaton in this proceeding.

The Market Data Approach

Both witnesses Rhodes and Powell for East Yolo used market data in arriving at their opinions as to the fair market value of the facilities to be taken.

Mr. Powell used data for nine sales of water companies or separate divisions of water companies to nonpublic agency buyers. The sales took place between 1962 and 1976 and the sales prices exceeded $0.8 million. Upon analysis of these sales Mr. Powell concluded that the sales prices generally approximate rate base. The departure from rate base ranged from a discount of one percent to a premium of 42 percent. The sale with the 42 percent premium included 1,800 acres of land which the buyer considered developable. Excluding that sale and another sale (where the premium was 23 percent), involving special circumstances not present here, the range was from a discount of one percent to a premium of eight percent of rate base.

Mr. Powell also analyzed the sale of Washington to Citizens Utilities Company in 1967 and found that the purchase price was at a premium of about 19 percent over rate base, again in the general range of the rate base rather than at a multiple of rate base. He testified that such sale "shows that replacement cost new less depreciation was not a significant factor in determining the amount paid by Citizens Utilities for the property." (Exhibit 7, p. 15.)

Mr. Rhodes, an appraiser for East Yolo, also used market data in arriving at his opinion of fair market value. He analyzed four sales occurring between 1969 and 1976 and determined that the price paid per service connection is a reasonably common denominator. The price per service connection ranged from $365 to

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"A. Not for this appraisal, for condemnation purposes." (Vol. 3, RT pp. 401-402.)

$507. Each of the four sales was analyzed by comparing it to the subject property on the basis of the general condition of the physical plant, the amount of accrued depreciation, and the proportion of equity involved in the price. Mr. Rhodes then adjusted each price to give effect to the three factors. After adjustment the prices ranged from $273 to $407 per service connection. Based on this range Mr. Rhodes concluded that Washington was worth $400 per service connection. The witness then multiplied 6,588 connections[11] times $400 per connection to arrive at his rounded market data estimate of $2,635,000.

Washington criticizes East Yolo's market data evidence on the basis that the sales selected are not comparable, that the number of sales of water companies are insufficient to establish a market, and that the sales did not reflect the most significant part of the market sales to public entities.

None of these contentions are meritorious. First, Mr. Powell's study avoids the criticism of lack of comparability. He does not state that because utility A sold for $2,000,000; therefore, Washington must sell for $2,000,000. It would, concededly, be difficult to find two water companies whose facilities were so similar in type and quantity that a recent sale of one could be said to establish the value of the other. What he does state is that sales of water companies between private parties occur at a price approximating rate base,[12] and that, therefore, rate base can be used as an indication of market value.

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[11] Washington's figures in connections are 6,595 connections, including 487 public fire hydrants and 42 private fire protection connections. (Exhibit 4, p. 9.)

[12] Mr. Stetsen, an expert appraiser for Washington, supported this conclusion in his "rebutal" testimony:

"Q. As I understand your testimony . . . you indicated . . . that the . . . sales [between private utilities] are generally based on rate base. . . .

"A. I didn't say that. I said valuation of private sales usually indicates that they are sold at a value approaching rate base.

"Q. So, in essence, those sales show that they are transferred, purchased and sold at a price approximating rate base?

Mr. Powell's study screens out factors which would eliminate particular sales as noncomparable, factors such as sales dates remote in time, involving locations far from the subject property, and facilities vastly different from those of the subject property.

Actually, Mr. Powell's study states no more than what should be obvious to anyone familiar with the utility business in California. Public utility earnings are regulated by this Commission. The basis of those earnings is an original cost, depreciated rate base. The sale price of a utility's facilities does not determine its earnings, since under this Commission's regulation, the new owner may not inflate rate base to reflect a sale price in excess of the original cost, depreciated rate base. No informed and reasonable private sector buyer, absent special circumstances, would pay two, three, or four times the rate base for a hypothetical utility earning 10 percent on rate base, since he would earn only 5 percent, 3.33 percent, or 2.5 percent, respectively, on his investment.

Second, the limited number of sales evidence herein provides sufficient evidence of a market, as we have previously concluded. Although not regularly traded, a few sales of these properties would be a valid indication of the value of similar property precisely because of the Commission's regulation.

Third, the sales selected were from the private sector only. None of the sales involved a public agency purchaser. East Yolo's witnesses did not include such sales in their study because, in their view, such data is inadmissible under Section 822 of the Evidence Code.[13] Even assuming Section 822 is inapplicable, the lack of data on sales to public agencies merely affects the weight

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"A. Yes, or a multiplier of rate base, a small multiplier." (Vol. 6 RT, p. 657.)

[13] Evidence Code, Section 822 states in relevant part:

"Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property:

"(a) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain."

of the evidence. Since, Washington offered no evidence of sales to public agencies, we are not called upon to weigh such evidence against the evidence of sales in the private sector.

Evidence Based on Capitalization of Earning

In his capitalization of earnings study Mr. Powell used Washington's "earning power", rather than its actual earnings to arrive at a fair market value. In other words he assumed that Washington's rates produce dollar earnings equivalent to its authorized rate of return multiplied by its rate base. Under this assumption, market value is equal to rate base. Accordingly, Mr. Powell concluded that, since Washington's rate base is $2,840,116, the capitalization of earnings approach would indicate a market value of the facilities being appraised in the amount of $2.8 million as of March 2, 1978.

Mr. Rhodes used a different methodology in arriving at market value based on capitalized earnings. First, he obtained his capitalization rate by examining four sales of water companies occurring between 1969 and 1976. For each of the four sales he mathematically computed the relationship between net operating revenue and the sale price in percentage terms and found that the net operating revenue as a percentage of sale price ranged from 5.2 percent to 6.69 percent after adjustment. He selected 5.5 percent[14] as the capitalization rate he would use for further calculations.

Next he developed three net operating revenue figures ($90,000; $122,950; and $104,160) using three different methods. When divided by the capitalization rate of 5.5 percent, market values of $1,636,000, $2,235,000, and $1,894,000 resulted. From this range of market values Mr. Rhodes concluded that his capitalization of income methodology indicated a market value of $2,000,000.

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[14] The average of the four figures, 5.2 percent, 6.2 percent, 6.69 percent, and 5.3 percent, is 5.9 percent. However, the use of the figure 5.5 percent benefits Washington.

Just Compensation

In arriving at a finding of just compensation we have discounted the evidence of value based on the RCNLD method. As indicated above, we do not believe any reasonable, willing buyer would for a moment consider using such a valuation methodology to determine the price he would pay for the facilities, rights, and properties of a utility company such as Washington. On the other hand, the evidence of value based upon capitalization of earnings, market data, and rate base places the value of Washington's property consistently in the range of $2,000,000 to $2,840,000. We find that the just compensation for the taking of Washington's lands, properties, and rights is $3,000,000[15] as of March 2, 1978.

Severance and Other Damages

Washington claims that in addition to compensation for loss of its physical plant and land in the sums of $11,924,800 and $350,650, respectively, it is also entitled to damages of $575,335 for severance and related damages, of $1,190,623 for loss of the PSIP System, and of $732,000 for loss of its undeveloped service area.

With respect to the item of $1,190,623 for loss of the PSIP System it is sufficient to note that there is no evidence of Washington's ownership of the PSIP System. Certainly there is no reason in law or equity to compensate Washington for the taking of property it did not own on the valuation date of March 2, 1978.[16]

Washington also claims damages of $732,000 for loss of its undeveloped service area. However, we believe that such a claim

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[15] This finding of value is based on the assumption that when it acquires the properties of Washington, East Yolo will also assume Washington's obligation for unrefunded advances for construction which totaled $1,267,024 (Exhibit 3-A) as of December 31, 1977.

[16] We are informed by the parties that Washington purchased the PSIP System on November 30, 1978. Section 1417 provides that the owner may file a petition for augmentation of just compensation to reflect expenditures made after the filing date of the original petition.

is not a proper subject of severance damages. Washington asks this Commission to speculate upon the future potential of the service area and to judge Washington's loss of business opportunity from the taking of its facilities therein. Washington's citations in support of its claim are not persuasive and the factual basis for the claim, resting as it does on Mr. Stradley's projections of significant customer growth in the future, is not entitled to much weight in light of Mr. Stradley's contrary projections in a recent rate proceeding.

The last item of $575,335 for severance and related damages is a composite of several different items. Severance damages to Washington are calculated as follows:

(1)	Deferred debit Account No. 146	$102,133
(2)	Preliminary Survey Charges, Account No. 142	6,334
(3)	Transfer, storage, sale, and disposal expenses	8,151
(4)	Lease payments	6,500
(5)	Mortgage prepayment penalties	3,593
(6)	Additional interest costs	38,007
	TOTAL	$164,718

In addition to damages of $164,718 to Washington, Citizens Utilities Company and its affiliated companies also claim $159,617 for lost allocated charges, consisting of:

(7)	Administrative and general expenses	$103,246
(8)	Insurance premiums	2,232
(9)	Data processing expenses	3,766
(10)	Salaries and wages	1,838
(11)	Retraining and relocating expenses	48,535
	TOTAL	$159,617

Finally, as related damages Washington claims $251,000 for the following items:

(12) Legal fees	$150,000
(13) Real estate valuation fees	12,000
(14) Stone and Webster fees	70,000
(15) Cost for company witnesses	14,000
(16) Other company expenses	5,000
TOTAL	$251,000

To summarize, Washington claims:

Severance damages to Washington	$164,718
Severance damages to Citizens, et al.	159,617
TOTAL SEVERANCE DAMAGES	$324,335
RELATED DAMAGES	251,000
GRAND TOTAL	$575,335

It would unduly lengthen this opinion for the Commission to discuss each of these 16 items of alleged severance and related damages. Suffice to say that severance damages represent the decline in value of the property of the owner left after a partial taking by the condemnor. Since East Yolo is taking all of Washington's utility facilities, there is nothing left to be damaged. Thus, items one through eleven are inappropriate items of severance damages.

Attorney fees and costs of suit are recoverable when a statute so provides. Washington has cited no statute to support its claim for damages in items twelve through sixteen.

We are convinced that no award of finding should be made with respect to the sixteen items of severance and related damages.[17]

Conclusions of Law

1. The *Heilbron* rule should be applied in valuing public utility property for just compensation purposes.

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[17] For an extended discussion of each of the sixteen items see East Yolo's opening brief, pp. 108-120.

2. The Commission is not compelled, as a matter of law, to employ only the RCNLD method in arriving at fair market value in a just compensation proceeding.

3. Capitalized earnings and market data evidence was properly admitted into evidence.

Findings of Fact

1. There is a relevant market for water companies in California.

2. Evidence of sales of other water companies sheds light upon the value of the subject property.

3. It is not reasonable to consider solely the RCNLD method of valuation in this proceeding.

4. Willing buyers and sellers of water companies in California would not look merely to an appraisal using the RCNLD method to arrive at the price they would pay or accept for such property.

5. Water companies are bought and sold in California at prices approximating rate base.

6. It is reasonable in valuing the property of Washington Water and Light Company for just compensation purposes to accord the greatest weight to evidence of capitalized earnings, market data evidence, and rate base, and the least weight to evidence of value based upon RCNLD.

7. The just compensation to be paid by East Yolo Community Services District for the lands, property, and rights of Washington Water and Light Company is the sum of $3,000,000 as of March 2, 1978, the day on which the petition was filed with the Commission.

8. No severance damages should be paid.

9. No related damages should be paid.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 5th day of June, 1979.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
CLAIRE T. DEDRICK
LEONARD M. GRIMES, JR.
Commissioners

I dissent.
VERNON L. STURGEON, *Commissioner*